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HOUSE BILL 494
By Scroggs

AN ACT to amend Tennessee Code Annotated, Title 5; Title 6; Title 7 and Section 71-5-117 relative to municipal subrogation recovery.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Amend Tennessee Code Annotated, Section 71-5-117, by adding the following subsection:

(g)(1) Medical assistance paid to, or on behalf of, any insured cannot be recovered from a beneficiary unless such assistance has been incorrectly paid, or, unless the insured or beneficiary recovers or is entitled to recover from a third party reimbursement for all or part of the costs of care or treatment for the injury or illness for which the medical assistance is paid. To the extent of payments of medical assistance, the municipality shall be subrogated to all rights of recovery, for the cost of care or treatment for the injury or illness for which medical assistance is provided, contractual or otherwise, of the insured against any person. When the municipality asserts its right to subrogation, the municipality shall notify the insured in language understandable to all insureds, of insured's rights of recovery against third parties and that insured should

seek the advice of an attorney regarding those rights of recovery to which insured may be entitled.

(2) Upon accepting medical assistance, the insured shall be deemed to have made an assignment to the municipality of the right of recovery from the third party insurance benefits to which the insured may be entitled. Failure of the insured to reimburse the municipality for medical assistance received from any third party insurance benefits received as a result of the illness or injury from which the medical assistance was paid may result in recovery actions by the municipality, which actions may include the full amount of the value of the benefits paid by the municipal insurance plan for the illness or injury for which the medical assistance was paid, plus a reasonable attorney fee, plus costs.

(3) The municipality shall have the right to employ own attorney to recover its subrogation interest. If the municipality chooses not to employ its own attorney, then the right of subrogation by the municipality to the insured's right to recovery shall be subject to ordinary and reasonable attorney fees; provided, that further, where an insured has retained an attorney, the attorney shall not be considered liable unless the attorney or the insured has notice from the municipality of the municipality's claim of subrogation prior to disbursement of the funds to the insured.

(4) The municipality's right of action under this section shall be authorized as part of the contractual functions of the individual managed care organization(s) which incurred the medical expenses on behalf of a municipal insured where the municipal health care program or policy deems appropriate.

(5) Before the entry of the judgment in a personal injury case the plaintiff's attorney shall contact the municipality's attorney or insurance department (or any entity acting pursuant to subdivision (4), in order to determine if the municipality has a subrogation interest. The plaintiff's attorney shall then inform the court regarding the

results of his contact with the municipality's attorney or insurance department. After trial and at the time of the entry of the judgment in a case in which the municipality (or any entity acting pursuant to subdivision (4)) has a subrogation interest under this section, it is the responsibility of the trial judge to calculate the amount of the subrogation interest and incorporate the court's findings concerning the subrogation interest in the final judgment. The gross amount of the subrogation interest shall be based upon the findings of the jury concerning medical expenses and evidence introduced after the trial about the total sum of monies paid by the municipality (or any entity acting pursuant to subdivision (4)) for medical expenses for injuries arising from the incident that is the basis of the action. The gross amount of the subrogation interest shall be reduced as follows:

(A) To the extent that the plaintiff is partially at fault in the incident giving rise to the litigation, the subrogation interest is reduced by the percentage of fault assessed against the plaintiff;

(B) To the extent that the finder of fact allocated fault to a person who was immune from suit, the subrogation interest is reduced by the percentage of fault assessed against the immune person;

(C) To the extent that the finder of fact allocates fault to a governmental entity that has its liability limited under municipal law and the fault of the entity (when multiplied by the total dollar value of the damages found by the finder of fact) exceeds the amount of judgment that can be awarded against the entity, the subrogation interest is reduced proportionately by a percentage derived by dividing the uncollectable portion of the judgment against the governmental entity by the total damages awarded; and

(D) To the extent that the finder of fact allocated fault to a person that the plaintiff did not sue, the subrogation interest is reduced by the percentage of fault assessed against the non-party.

(6) After these calculations are performed, the judge should further reduce the subrogation interest pro rata by the amount of reasonable attorneys' fees and litigation costs incurred by the plaintiffs in obtaining the recovery as required in subsection (c). The judge should not reduce the subrogation interest for attorneys' fees if the municipality was represented in the lawsuit by its attorney.

(7) The amount determined after performance of the calculations in subsections (e) and (f) is the net subrogation interest. If the plaintiff or plaintiff's counsel collects the judgment, each has the obligation to promptly remit the net subrogation interest (and attorneys' fees and costs to any counsel employed by the municipality or its assignee) as required by the final judgment. In the event that the plaintiff and his counsel collect only a portion of the final judgment, each has the obligation to promptly remit a pro rata share of the net subrogation interest (and attorneys' fees and costs to any counsel employed by the municipality or its assignee) as required by the final judgment. In the event that plaintiff or plaintiff's counsel later collect additional monies against the judgment, there is a continuing obligation on both of them to remit a pro rata share of the monies collected as required by the final judgment.

(8) In the event that the case between the plaintiff and the defendant is settled before trial but after a lawsuit is filed and the parties and the municipality or its assignee are unable to reach an agreement on the amount of the subrogation interest, the trial judge shall hold a hearing to determine the gross and net subrogation interests, taking into account the criteria listed in subdivisions (5) and (6) and the likelihood of collecting any judgment against parties determined to be at fault. Any aggrieved party may appeal from the court's decision.

(9) It is the intention of the legislature that subdivisions (5)-(8) be used in lieu of application of the "made whole" doctrine for any recovery authorized under this section.

SECTION 2. This act shall take effect upon becoming a law, the public welfare requiring it.